



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 40 OF 2017
(DEFILEMENT ACT)
(CORAM: J.A. MAKAU – J.)

GEORGE ODHIAMBO OMALLAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence dated 5.4.2017 in Criminal Case No. 717 of 2016 in Siaya Law Court before Hon. T.M. OLANDO -SRM)

RULING

1. The Appellant **GEORGE ODHIAMBO OMALLA** faced a charge of **defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 18th day of July 2016, in Siaya District within Siaya County, intentionally caused his penis to penetrate the vagina of SA a child aged 8 years.
2. After full trial the Applicant was found guilty, convicted and sentenced to life imprisonment.
3. Aggrieved by the conviction and sentence, he lodged this appeal on 18th April 2017 setting out 9 grounds of Appeal, being as follows:-
 - i. That the trial magistrate erred both in law and fact in relying on evidence which was contradictory and variant.*
 - ii. That the trial magistrate erred in law and fact by failing to make a firm finding that the standard of proof of beyond reasonable doubt as enunciated in matters of criminal flavor was not met and no tangible effort was made thereto.*
 - iii. That the learned Magistrate failed and/or deliberately failed to appreciate the good demeanor of the Appellant from the onset and throughout the hearing.*
 - iv. That the trial magistrate ignored the fact that no investigation on proper investigations were carried out in this case thereby leading to a grave injustice as there was nothing tangible to associate the Appellant with the commission of the offence under the charge.*
 - v. That the Learned Magistrate failed, refused and/or deliberately neglected to caution himself as*

to the dangers of relying on uncorroborated evidence of a single witness to wit the complaint and as such the conviction was immoral and legally unsound.

vi. That the Learned Magistrate closed his eyes on lack of material evidence and/or deliberate destruction thereof so as to hide the truth as to misdirect himself deliberately and/or with knowledge leading to unfortunate conviction and harsh sentencing.

vii. That the Learned Magistrate erred in law and fact when he conducted a defective voire dire wherein it was not ascertained whether the child understood what oath taking was for and moreover, the Learned Magistrate even after undertaking a defective voire dire process, proceeded to illegally allow the minor to give unsworn testimony and allowed cross-examination in the same breath. This was a fatal commission and/or omission and as such it is incurable.

viii. That the record as certified is incomplete thereby cleverly avoiding part crucial testimonies by witnesses that would otherwise exonerate the Appellant. Unless there is typographical/error, then the trial court discriminately chose to record testimonies leaving out crucial section at the detriment of the Appellant.

ix. That the Appellant was NEVER subjected to a medical test and as such the Learned Magistrate never made a medical treatment order given that the Appellant is terminally ill.

4. The Applicant filed an application thereafter dated 26th April 2017, pursuant to **Section 357(1) of the Criminal Procedure Code** seeking the following orders:

a. That this application be certified as URGENT and heard on priority basis.

b. That the appellant/applicant be and is hereby admitted to bail pending the hearing and determination of the appeal.

c. That costs be in the cause.

5. Mr. Obwatinga, Learned Advocate, for the Appellant, sought prayer No. 2 of the application, on the grounds on the face of the application and the affidavit, urging the offence is bailable and that the Applicant has filed appeal, which appeal has high chances of success and that the applicant has a permanent place of **abond**, that he complied with bail term at the lower Court, that he is not a flight risk, that he is sickly and as such he needs medication, that he is not a jailbird. That the appeal has overwhelming chances of success.

6. M/s. Odumba, Learned State Counsel, opposed the appeal and relied on grounds of opposition dated 6.6.2017. She urged that the Appellant is no longer an Accused person but a convict, and has as such lost his presumption of innocence, as he has already been convicted by a competent Court and he does not qualify to get bond except under exceptional circumstances which the counsel failed to demonstrate, that the appeal has no chance of success. That the sickness the Applicant is suffering from is not unique or new urging the prison department has the best support system for individual ailing from similar disease and that is not a ground that should be considered, as exceptional or special ground to warrant the granting of the bail. That the sentence meted makes the Applicant a flight risk.

7. The Applicant's application is premised under **Section 357 of the Criminal Procedure Code** which provides:-

“(1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal: Admission to bail or suspension of sentence pending appeal.

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

(3) The Chief Justice may make rules of court to regulate the procedure in cases under this section”

8. The High Court is in view of **Section 357 of CPC**, is clothed with powers to hear an application for bail/bond and grant or refuse to grant bail/bond with or without sureties or to suspend the execution of any sentence meted by the subordinate court pending the hearing and determination of the appeal lodged before it. The admission to bail/bond pending appeal is a discretionary power which the court must exercise judiciously in accordance with the laid down principles. The court in granting bail pending appeal is obliged to consider the circumstances of each case so that the discretion is exercised judiciously and not capriciously. There is in considering such an application a presumption that once a person is convicted, he was properly convicted and the factors to be considered are totally different from the ones to be considered in dealing with an application by an accused person before conviction.

9. It is therefore of paramount importance in dealing with an application for bail/bond pending hearing and determination of an appeal to bear in mind that there are set out parameters to be considered by the appellate court in dealing with application for bail pending appeal. In the case of **Jivraj Shah V Republic (1980) KLR 605** The Court of Appeal stated that:-

i. “The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.

ii. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.

iii. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

10. In the case of **Ademba V Republic (1983) KLR 442** the court of Appeal as regards the parameters to be considered by an appellate court in an application for bail pending appeal held thus:-

i. Bail pending appeal may only be granted if there are exceptional or unusual circumstances.

ii. The likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties in view of the unlikelihood of success in this appeal, the application could not succeed.”

11. I am alive of the fact that there are myriads of authorities which have enunciated the principles that the court should consider when faced with an application for bail/bond pending appeal. In the Case of **David V R (1972) EA the Court of Appeal** stated:-

“..... the most important ground is that where an appeal has an overwhelming chance of being successful on the case there is no justification for denying the applicant of his freedom.”

12. In an application for bail/bond pending hearing and determination of appeal the burden of demonstrating to the appellate court that the grounds of appeal set out in the petition of appeal has overwhelming chances of success lies with the applicant and that factor, taken either within the contention that the sentence or substantial part of it will have been served by the time the appeal is heard, the condition for granting bail will exist. That bail/bond may further be granted if there are exceptional or unusual circumstances, however matters relating to Appellant having not jumped bail at the lower court, not a flight risk, or terminally ill and requiring constant medical attention and not being a jail bird or Applicant previous good character nor applicant's assertion that he will faithfully abide by whatsoever bond terms the court may impose or threat of losing of employment if bail/bond is not granted or sentence being harsh and excessive (*unless the sentence is illegal*) be taken as exceptional circumstances or as reasons for releasing the Applicant on bail/bond pending appeal (See **HCCRA No. 56 and 57 of 2014 Dennis Yobesh Ombogo & Another V R (2014) eKLR**)

13. I have very carefully perused the trial Court's proceedings and the petition of appeal and the grounds set out in the Applicant's application for bail pending hearing and determination of the appeal. There is issue as to whether the prosecution's case was contradictory and varient and whether prosecution proved their case beyond any reasonable doubt, whether the complainant's evidence was corroborated, whether there was a conduct *voire dire* examination, failure to available crucial witnesses however, the applicant's Counsel failed to demonstrate any of the grounds stated in the petition would lead to overwhelming chance of success of the appeal. He did not demonstrate any exceptional or unusual considerations or overwhelming chances of success in the Appeal. That the Application failed the test for granting bail pending Appeal.

14. In light of the matters raised in the application and in light of the opposition of the application, I find no merits in the application for bail pending appeal. The same is accordingly dismissed.

DATED AND SIGNED AT SIAYA THIS 22ND DAY OF JUNE, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 22ND DAY OF JUNE, 2017.

IN THE PRESENCE OF:

MR. APPOLLO holding brief MR. A.G. OPIYO for Applicant

MR. OMBATI FOR THE RESPONDENT

C.A. 1. L.. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE